

DEPARTMENT OF STATE REVENUE

02920709.LOF

LETTER OF FINDINGS NUMBER: 92-0709 ITC
GROSS ADJUSTED GROSS INCOME TAX

For Years 1985, 1986, and 1987

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

1. Gross Income Tax – Failure to Include taxable receipts reported.

Authority: IC 6-2.1-1-13

The taxpayer protested the failure of the auditor to include amounts reported by taxpayer as taxable receipts.

2. Gross Income Tax – Inclusion of gross receipts after sale of Division

The taxpayer protested the auditor's inclusion of low rate receipts that occurred in May and June of 1986.

3. Gross Income Tax - Agency

Authority: IC 45 IAC 1-1-54(2); 45 IAC 1-1-45; *Bloomington Country Club v. State of Indiana, Dept. of Revenue*, (2nd. Tax 1989); *United Artists Theatre Circuit v. Indiana Dept of State Revenue*, (2nd. App. 1st Dist. 1984), 459 N.E.2d 754.

The taxpayer protested the assessment of gross income tax on receipts from a wholly owned subsidiary.

4. Adjusted Gross Income Tax – Miscellaneous issues

Authority: IC 6-8.1-5-1.

The taxpayer protested the calculation of the net operating loss carryforward.

STATEMENT OF FACTS

The taxpayer is a conglomerate engaged in several areas of business. The taxpayer has operations in most if not all of the fifty (50) states of the United States and some foreign countries. The taxpayer was assessed gross income tax for tax year 1985 and received refunds for tax years 1986 and 1987. The taxpayer filed consolidated returns for gross and adjusted gross income tax. Each year of the audit period the taxpayer was in a loss position for adjusted gross income tax and was assessed only gross income tax.

DISCUSSION

1. Gross Income Tax – Failure to Include taxable receipts reported for April 1985

The taxpayer protested the failure of the auditor to include amounts reported by the taxpayer as taxable receipts. The taxpayer alleges that the auditor failed to include in the calculation of gross receipts reported, income from three divisions. The auditor agrees with the taxpayer.

FINDINGS

The taxpayer's protest is sustained.

2. Gross Income Tax – Inclusion of gross receipts after sale of Inventory

The taxpayer protested the inclusion of amounts representing the May and June 1986, sales from Indiana inventory. The auditor properly adjusted the taxpayer's receipts to include the proceeds from the sale of the inventory to a third party, but the fact that the sales of Indiana inventory occurred after the date of the sale of the inventory to a third party was not known at the time of the audit.

FINDINGS

Taxpayer's protest is sustained to the extent the sales in dispute actually occurred after the date of the sale of the Indiana inventory to a third party.

3. Gross Income Tax - Agency

The taxpayer protested the assessment of gross income tax on receipts received from a wholly owned subsidiary. The taxpayer contends that Rule 45 IAC 1-1-54 provides that taxpayers are not subject to gross income tax on income they receive in an agency capacity. Where sufficient control over taxpayer's actions such that taxpayer acts pursuant to the other's wishes, an agency relationship is created. Industry standards mandate the performance of safety repairs on cars of other railroads under certain parameters adopted by the members of the industry. Taxpayer had no ability to choose whether or not to undertake such repairs. Thus, it is taxpayer's contention that the amounts received from these repairs are in the nature of cost reimbursements and do not result in receipts subject to Indiana Gross Income Tax.

The taxpayer also contends that the payments received from joint facilities were received in an agency capacity as reimbursements of expenses. The taxpayer stated that Rule 45 IAC 1-1-54 provides that where an agency relationship exists, reimbursements for costs under the agency relationship are not subject to Indiana gross income

tax. Under such a relationship, a relinquishment of control by the agent to the principal is necessary such that the principal is responsible for the acts of the agent and/or the agent lacks sufficient control over his actions so as to be liable for such transactions.

Taxpayer received receipts representing the prorated cost of a shared joint facility. Taxpayer has entered into a contract whereby it has relinquished control over certain activities, such that an agency requirement has been created. In the situation at issue, taxpayer maintained certain facilities in working order, and in return, other using railroads were obligated to reimburse taxpayer on a pro-rata basis, for the expenses incurred by the railroad maintaining the facility. In this situation, the payments received by taxpayer do not represent gross receipts in the nature of income, but rather in the nature of reimbursements of expenses incurred by the taxpayer by and on behalf of the other railroads sharing the facility. When discussing the “agency” claim, it is important to keep in clear view the rule concerning the status of agency income. There is no rule that income received “as an agent” is not to be taxed; the “rule” is that “a taxpayer is not liable for gross income received on behalf of a third person” *United Artist Theatre Circuit v. Indiana Department of State Revenue* (Ind. App. 1st Dist. 1984), 459 N.E.2d 754, 756-57. In this case, the receipts were not “received on behalf of a third person” but by the entities to whom they were due. There is not in this case a third person for whom the money was being collected by an entity, which had no legal right to the money. Compare *Bloomington Country Club v. State of Indiana, Department of Revenue* (Ind. Tax 1989), 543 N.E.2d 1. The receipts at issue are the taxpayer’s receipts. The taxpayer is not merely passing the receipts along, as a conduit, to another person or entity. The fact is that the receipts at issue were receipts, for services rendered. In the instant situation there is no conduit, merely the performance of services.

FINDINGS

The taxpayer’s protest is denied.

4. Adjusted Gross Income Tax – Miscellaneous issues

The taxpayer protested the calculation of the net operating loss. The taxpayer does not agree with the auditor’s computation of the net operating loss. The taxpayer alleges that intercompany eliminations were inadvertently omitted from the sales factor denominator, and that the foreign subpart F dividends, but not the domestic dividends were used to reduce the taxpayer’s 1987 net operating loss available for carryforward. The auditor agrees that the sales factor denominator should be reduced by the following amounts: 1. 1985 - \$2,950,894,958; 2. 1986 - \$1,325,862,148; and 3; 1987 - \$2,142,293,531. The taxpayer was not assessed adjusted gross income tax. The taxpayer could not be assessed adjusted gross income tax for the years at issue, because these were loss years.

IC 6-8.1-5-1 states:

...The department shall send the person a notice of the proposed assessment through the United States mail.... The notice of proposed assessment is prima facie evidence that the department’s claim for the unpaid tax is valid, and the burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. The notice shall state that the person has sixty (60) days from the date the notice is mailed to pay the assessment or to file a written protest. If the person files a protest and requires a hearing on the protest, the department shall set the hearing at the department’s earliest convenient time and shall notify the person by the United States mail of the time and date and location of the hearing....

The above referenced statute permits the taxpayer to protest a proposed assessment. In the present case there is not an assessment of adjusted gross income tax. Furthermore, the correct calculation of a net operating loss carryover deduction may always be challenged by the taxpayer and the Department in the year in which it is actually used. Therefore, the adjusted gross income tax issues will not be addressed.

FINDINGS

Taxpayer’s protest is partially sustained. The sales factor denominator should be reduced in accordance with the discussion. The remainder of the taxpayer’s adjusted gross income tax protest is denied.